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THE NEGOTIABLE INSTRUMENTS LAW.

(A REVIEW OF THE AMES-BREWSTER CONTROVERSY.)

First Paper.

The Negotiable Instruments Law has now been adopted by twenty states¹ as well as for the District of Columbia, and there is little doubt that in a very few years, at the longest, it will be the law throughout this country. Aside from the importance of the subject with which it deals, the act claims a peculiar interest as being the first important step taken in this country towards codifying any branch of the law. In 1878, Judge Chalmers published his digest of the law relating to bills of exchange, in the preparation of which he read through all the English cases (some twenty-five hundred in number) beginning with the first reported case in 1603. Where there was a dearth of English authority, he states that he had recourse to the American decisions and to the usages among bankers and

¹ Arizona, Connecticut, Colorado, Florida, Iowa, Maryland, Massachusetts, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Virginia, Washington and Wisconsin.

merchants. Two years after the publication of the digest, the Institute of Bankers and the Associated Chambers of Commerce instructed him to prepare a bill on the subject. This he did, his aim being, to use his own words, "to reproduce, as exactly as possible, the existing law, whether it seemed good, bad or indifferent in its effects." The bill was introduced into Parliament in 1881, and after a few amendments had been made by the Select Committee of merchants, bankers, and lawyers, to which it was referred by the House of Commons, and by the Select Committee headed by Lord Bramwell, to which it was referred by the House of Lords, it passed both houses without opposition. It is worth noticing that amendments were inserted only when the Committee was unanimous in their favor, no amendments being pressed on which there was a difference of opinion. Practically, the English bill was an enactment into law of Judge Chalmer's digest. For the most part the propositions of the act were taken word for word from the propositions of the digest, and excepting a few amendments which were inserted to choose between conflicting decisions, or to correct some admittedly serious errors in the law, the whole purpose of the English Bills of Exchange Act was to reproduce, as exactly as possible, the existing law. This act has now been in force in Great Britain for twenty years, and has been adopted by all of her self-governing colonies. English merchants, bankers and lawyers appear to unite in the opinion that it has been successful even beyond expectation.

At the Annual Conference of the Commissioners on Uniform State Laws, held in Detroit in 1895, a resolution was passed requesting the Committee on Commercial Law to procure, as soon as practicable, a draft of a bill relating to commercial paper based upon the English Bills of Exchange Act and on such sources of information as the Committee might deem proper to consult. The matter was referred to a sub-committee consisting of Judge Lyman D. Brewster, of Connecticut; Henry C. Willcox, of New York, and Frank Bergen, of New Jersey, who secured Mr. John J. Crawford, of the New York bar, a well-known expert on the law of bills and notes, to draft the proposed bill.

The English act had followed the continental codes as to form, *i. e.* it dealt primarily with bills of exchange, and then applied those provisions, so far as they were applicable, to promissory notes, adding provisions which were peculiar to the latter class of instruments. Deeming this form to be unsuited to American conditions—the use of bills of exchange being proportionately less extensive here than in Europe—Mr. Crawford adopted a form of his own, which grouped together the provisions applicable to all kinds of negotiable instruments, and then collected, under separate articles, the provisions specially affecting the different classes.

Mr. Crawford's draft was laid before the sub-committee, each section being annotated with reference to the decisions of the Courts, the comments of text-book writers, and the statute laws of the several states. This draft (slightly amended by the sub-committee) and the draftsman's notes were printed along with the English bill for comparison, and copies were sent to each member of the Conference, to many prominent lawyers and law professors, and to several English judges and lawyers, with an invitation for suggestions and criticisms. The draft was then submitted to the Conference at Saratoga in 1896. The twenty-seven Commissioners who were in attendance—representing fourteen different states—went over it section by section, and made some amendments to it, "most of which," says Mr. Crawford, "were such changes in the existing law as I had not felt at liberty to incorporate into the original draft."² The draft as thus amended was adopted by the Conference, and in such form has been submitted to the various state Legislatures.

The most important contribution that has been made to the act is the Ames-Brewster controversy. In the Fourteenth *Harvard Law Review*, Professor James Barr Ames, Dean of the Harvard Law Faculty, for some years lecturer on Bills and Notes in the Harvard Law School, and the author of the leading case book on the subject, published an article criticising some twenty-three sections of the new act,

² Crawford's An. N. I. L. Preface.

and expressing the opinion that notwithstanding the act's many merits, "its adoption by fifteen states must be regarded as a misfortune, and its enactment in additional states, without considerable amendment, should be an impossibility." Professor Ames' criticisms were answered by Judge Lyman D. Brewster, President of the National Conference on Uniform State Laws, and a member of the subcommittee which drafted the act. The discussion consists of two articles in the *Harvard Law Review*, by Professor Ames,³ and two articles by Judge Brewster, one published in the *Yale Law Journal* and one in the *Harvard Law Review*.⁴ In a pamphlet recently published by the Harvard Law Review Publishing Association, containing the text of the act, together with these articles, there are added a supplementary note by Professor Ames criticising two additional sections of the act—a reply thereto by Judge Brewster, and a letter containing comments on some points of the discussion by Mr. Arthur Cohen, Q. C., a member of the committee which framed the English act, who was recommended by Judge Chalmers as one of the three best authorities in England on the law of bills and notes.

As Judge Brewster remarks, "No keener weapon than that wielded by the accomplished Dean of the Harvard Law School could be turned against the Negotiable Instruments Law." Professor Ames knows more about the law of bills and notes from the student's standpoint than any one else in this country. Whatever one's conclusions may be as to the soundness of his criticisms, there is little doubt that few, if any, of the vulnerable points in the act have escaped his notice, and that the sections he criticises are those most likely to come up for construction. A familiarity with his criticisms and with Judge Brewster's replies cannot but aid both the bench and bar in giving some sections of the act their proper meaning. This consideration, together with the difficulty of understanding the discussion in its present form, where the criticism of each section, the answer, replication and rejoinder are spread out through four separate articles, has prompted me to write a review of the controversy.

³ 14 *Harvard Law Review*, 241; 14 *Harvard Law Review*, 442.

⁴ 10 *Yale Law Journal*, 84; 15 *Harvard Law Review*, 26.

Two general observations may be made, which should be borne in mind throughout the entire discussion. In the first place, no one can judge the new act fairly who does not realize that the Commissioners were attempting to *codify* the law.⁵ Their aim was not to reform the law of negotiable paper. It was to state accurately and concisely the existing law. Of course, here and there it was necessary to choose between two or more conflicting views. Very frequently a section changes the law in a small minority of states which had departed from the almost uniform current of authority. Occasionally, though very rarely and only when there seemed to be no room for a difference of opinion, the law was deliberately changed. But the main, and almost the sole purpose of the framers of the Negotiable Instruments Law was to reproduce, as exactly as possible, that which the great weight of authority had declared to be the law.

Second, in interpreting some sections of the act, the language used must be given not a hyper-literal meaning, but a reasonable legal meaning, derived, to some extent, from a knowledge of the cases on which the sections are based. It would be a great achievement for a code to state the law, in every instance, in language capable of meaning only one thing, even to a man entirely without legal training and unacquainted with what the law was before the code. But it will be a long time before such a code is framed. Of course, in the great majority of instances the Negotiable Instruments Law does this. But it is not a serious reflection on the act that in some instances a familiarity with the cases on which the language of the act is based, is—if not

⁵ The discussion between Professor Ames and Judge Brewster makes no attempt to take up the broad question as to the propriety and utility of codification. For a most learned and able argument against codification, the reader may be referred to a book by R. F. Clarke, Esq., of the New York bar, entitled "The Science of Law, and Law Making." The arguments in favor of at least a partial codification of such a branch of the law as that relating to commercial paper are concisely stated by Judge Brewster in a paper read before the American Bar Association in 1898 on "Uniform State Laws," which is reprinted in the report of the Ninth Conference of the Commissioners for Promoting Uniformity of Legislation in the United States.

necessary—at least very helpful in deciding what the language means. Indeed, Judge Brewster said to the American Bar Association, in discussing the new act in 1898, “Care has been taken to preserve, as far as possible, the use of words which have had repeated construction by the courts, and have become recognized terms in the law merchant.”

With these observations we may proceed to consider the discussion of particular sections.

Section 3, par. 2:

“An unqualified order or promise to pay is unconditional within the meaning of this act though coupled with a *statement of the transaction which gives rise to the instrument.*”

“What,” asks Professor Ames, “do these words mean? Do they cover the case of a note coupled with the words ‘given as collateral security for A.’s debt to the payee?’ Such an interpretation, although a literal one, would be deplorable and would nullify several decisions.”⁵ It would, indeed, be deplorable, for such notes are clearly conditional and courts have uniformly refused to regard them as negotiable.

Judge Brewster’s answer is that this clause does not apply to the case put since “a note ‘given as collateral security’ contains notice, upon its face, that the note is not an unconditional promise to pay, but conditional upon the nonpayment of the principal debt.” And he refers to Section 1, par. 2, which requires a negotiable instrument to contain “an unconditional promise or order to pay a sum certain in money.” There is no danger that any court will ever make the innovation that would result from the “deplorable interpretation,” indicated by Professor Ames. Nor could such a conclusion easily be reached from the language of the act. Without turning back to the first section, the very clause under discussion speaks only of “an *unqualified* order or promise.” If “the statement of the transaction” contains

⁵ *Robbins v. May*, 11 A. & E. 213; *Haskell v. Lambert*, 16 Gray 592; *Costello v. Crowell*, 127 Mass. 293; 134 Mass. 280, 285; *American Bank v. Sprague*, 14 R. I. 410; *Hall v. Merrick*, 40 Up. Can. Q. B. 566.

a qualification of the order or promise, if it shows that the instrument is not payable at all events, but only on a contingency, the instrument can scarcely be said to contain "an unqualified order or promise." A fair and reasonable reading of the section would scarcely require even the most literal interpreter to hold that this clause covers a note given as collateral. To do so, he would have to construe it as meaning, "a note is unconditional provided you start it with an unqualified promise, no matter how many qualifications and conditions are later embodied in the statement of the transaction which gave rise to the instrument." Such an interpretation would be far-fetched, not literal.

But Professor Ames makes another criticism of this clause of Section 3, which is less easily disposed of. The real purpose of this clause, as we learn from Mr. Crawford,⁷ who drafted the act, and from Judge Brewster, is to cover the case of a note which contains a statement that it is given for a chattel, which is to be the property of the owner of the note until the note is paid. Such notes are usually regarded as negotiable.⁸ Several states, however, have taken the opposite view, holding that such notes are non-negotiable,⁹ and it was to bring the latter states into accord with the more general view and unify the law on this point, that this clause was inserted. But will it accomplish this object? That is Professor Ames' further criticism. The only case touching the point is of little or no assistance,¹⁰

⁷ Crawford. An. N. I. L. 12.

⁸ *Chicago Co. v. Merch. Bank*, 136 U. S. 268; *Howard v. Simpkins*, 69 Ga. 773; *Choate v. Stevens*, 116 Mich. 28; *Heard v. Dubuque Bank*, 8 Neb. 10; *Mott v. Havana Bank*, 22 Hun. 354; *National Bank of Royersford v. Davis*, 6 Montg. Co. (Pa.) 99; *Kimball v. Mellon*, 80 Wis. 133.

⁹ *Sloan v. McCarthy*, 134 Mass. 245; *South Bend Co. v. Paddock*, 37 Kan. 510; *Third Nat. Bank v. Armstrong*, 25 Minn. 530; *Deering v. Thorn*, 29 Minn. 120.

¹⁰ *Third Bank v. Spring*, 28 N. Y. Misc. Rep. 9. White, J., held that a note, containing a statement that it is given for a piano, the title of which shall remain in the payee until the note is paid, is not a negotiable instrument. After so holding, he simply remarks that Section 3, par. 2 of the Negotiable Instruments Law "has no application here." This decision was reversed in 50 N. Y. App. Div., 66, the court making no allusion to the statute, but merely holding with the current of authority that such a note is negotiable. Judge Brewster points out

but it may seriously be doubted whether this clause will overrule the decisions at which it was aimed. It does not cover a note "given as collateral security" because such a note "contains notice, upon its face, that the note is not an unconditional promise to pay." Suppose a judge decides that a chattel note (one containing a statement that it is given for a chattel which is to remain the property of the payee until the note is paid) is not an unconditional promise to pay. Would he feel that this clause covers such an instrument? And at least some of the courts which hold chattel notes non-negotiable do so on precisely this ground. *Sloan v. McCarthy*.^{10a} By the instrument sued upon in that case, the defendant promised to pay Sloan, one month from date, \$85, for a roan horse known as A. M., "said horse to be and remain the entire and absolute property of the said Sloan until paid for in full by me." The court said this note contained a conditional promise and so was non-negotiable. "If the money were not paid by the defendant at the time specified, the plaintiff could, if he chose, rescind the conditional sale and the defendant would then have no right to the horse, and would no longer be liable to pay the note. . . . If the horse should die within the month without fault on the part of the defendant, the plaintiff would be disabled from transferring the title and could not maintain an action on the contract."¹¹ Now, if Section 3, par. 2, does not cover a note "given as collateral security" for the very reason that such a note shows on its

that the note in this case was made in 1896 and negotiated in May, 1897, but that the New York Negotiable Instruments Law did not become operative until October, 1897, and, therefore, as Judge White said, had no application to the case. Whether Judge White meant that the act did not apply because it was not yet operative, or because the note under discussion was not covered by the section referred to, does not appear.

^{10a} 134 Mass. 245 (1883).

¹¹ The Minnesota courts give the same reason for their decision as those of Mass. *Third Nat. Bank v. Armstrong*, 25 Minn. 530.

But the Kansas courts (also instanced by Professor Ames) hold chattel notes to be non-negotiable, not so much on the ground that they are *conditional*, as that they contain stipulations other than the promise to pay money. *Killan v. Schoeps*, 26 Kan. 310 Pg. 312; *South Bend Co. v. Paddock*, 37 Kan. 510. Should Kansas adopt the act, her courts might, therefore, hold that the section under discussion changed the above cases.

face that the promise contained in it is conditional, why will it cover a "chattel note" in jurisdictions which say that a chattel note shows on its face that the promise contained in it is conditional? That is Professor Ames' second criticism, to which no answer seems to be furnished in Judge Brewster's replies.

Professor Ames' conclusion is that Section 3, par. 2 is "either useless or provocative of litigation."

If, by "useless" is meant that it will fail to overrule the cases which hold chattel notes non-negotiable on the ground that they are conditional promises, this subsection may prove to be useless. Aside from this, however, it may not have been unwise to insert it in the act. The clause is copied almost word for word from Section 3, par 3 of the English act,¹² which was inserted to codify the decisions of cases¹³ in which the instruments sued on contained language which, while absolutely unnecessary to a negotiable instrument, nevertheless did not qualify the promise in any way, nor contain any independent promise, but amounted to nothing more than a brief description of how the instrument came to be drawn—a statement of the consideration for which it was given—a memorandum that collateral security for the note had been given—an indication of the nature of the transaction. The courts held that such language did not affect the negotiable character of the instrument. Referring to this subsection, Mr. Arthur Cohen says: "The words in the English act correctly state what the English law is." The courts of this country do not differ on this point from those of England. They have held almost unanimously that language such as that used in the English cases referred to does not destroy the negotiable character of a bill or note.¹⁴ Section 3, par. 2, of the new

¹² English Bills of Exchange Act (August 18, 1882) 45 and 46 Vict. C. 61. Sec. 3-3: "An unqualified order to pay coupled with a statement of the transaction which gives rise to the bill, is unconditional." And by Sec. 89 the above clause applies to promissory notes.

¹³ *Houssoullier v. Hartsinck*, 7 Term Rep. 733 (1798); *Griffin v. Weatherby*, L. R. 3 Q. B. 752 (1868).

¹⁴ 4 *Am. and Eng. Encyc. of Law*, 2d Ed. 89 and cases there cited. 1 Ames' Cases on "Bills and Notes." Note on p. 56. *Devenny v. League Island Loan and Bldg Assn.*, 9 W. N. C. (Pa.) 127; *Citizens' Nat. Bank of Towanda v. Piolett*, 126 Pa. 194.

act will doubtless be regarded here as it has been for twenty years in England, as a codification of this rule of law, and as such may serve a useful purpose.

Whether the clause will be provocative of litigation remains to be seen. It has not given rise to a single case in England, where it has been in force for twenty years, nor has any case arisen under it as yet in this country. It will quite likely come up for construction in the very few jurisdictions which have hitherto held chattel notes non-negotiable, but it is extremely unlikely that any lawyer will ever attempt to have it applied to notes "given as collateral security." Therefore, about the worst that can be said against it is that it may not accomplish quite all that its framers intended.

Section 9, par. 3 :

"The instrument is payable to bearer when it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable."

Professor Ames levels two criticisms at this sub-section. In the first place, he says that such a rule "ignores the tenor of the instrument," meaning, for one thing, that to say an instrument payable to "John White or order" is payable "to bearer" is to ignore what the instrument itself says—even though no such person as John White exists. The correct way to interpret such an instrument, says Professor Ames, is to give it the effect of an instrument payable to the order of and indorsed by the drawer or maker respectively. Thus a bill drawn by Andrew Smith payable "to the order of John White" (a fictitious payee) and indorsed in the name of John White ought to be treated as a bill drawn by Andrew Smith payable to his own order, and by him indorsed—this result being reached by regarding the bill as payable to Andrew Smith by the name of John White.¹⁵ Professor Ames objects to treating any such instrument as payable "to bearer." Undoubtedly there are strong argu-

¹⁵ Professor Ames has long insisted that this is the correct way of interpreting such instruments. See Ames' Cases on "Bills and Notes," Vol. 2 Summary, p. 864, published in 1881.

ments in favor of such a view, and the whole question of fictitious payees might have been simpler and more logical had they originally prevailed. As a matter of fact, however, the act on this point merely codifies that which has been the settled law of England and America for more than a century. The arguments in support of Professor Ames' view were fully presented both to the Court of King's Bench and to the House of Lords in the leading case of *Minet v. Gibson*,¹⁶ decided in 1791. Both courts repudiated them and held that the holder in due course of a bill payable to the order of a fictitious payee could, as against the drawee who accepted knowing that no such person existed, declare on the bill as payable to bearer and recover.¹⁷ Lord Chief Baron Eyre delivered a powerful dissenting opinion. "His reasoning," Professor Ames has said, "has never been refuted."¹⁸ It is equally true that it has never been followed. *Minet v. Gibson* has been practically unanimously followed both by English and American courts.¹⁹ It was followed, moreover, in the English Bills of Exchange Act,²⁰ and it would have been strange indeed if the framers of the American act, who were *codifying* the law, who were framing a code, moreover, which would have to

¹⁶ 1 H. Blackstone, 569.

¹⁷ *Minet v. Gibson* is universally regarded as the leading case on this point, though there had been several earlier decisions to the same effect. *Tatlock v. Harris*, 3 T. R., 174; *Vere v. Lewis*, 3 T. R. 182; *Collis v. Emmett*, Term Rep. C. P., 313.

¹⁸ Ames' Cases on "Bills and Notes," Vol. 1, p. 421.

¹⁹ *Gibson v. Hunter*, 2 H. Bl. 187, 288; 6 Bro. P. C. 235, s. c.; *The Royal Bank of Scotland*, 19 Ves. 310; *Farnsworth v. Drake*, 11 Ind. 101; *Smith v. Mechanics' Bank*, 6 La. An. 610, 624 (semble); *Bartlett v. Tucker*, 104 Mass. 336, 344 (semble); *Rogers v. Ware*, 2 Neb. 29 (semble); *Foster v. Shattuck*, 2 N. H. 446; *Plets v. Johnson*, 3 Hill, 112; *Stevens v. Strang*, 2 Sandf. 138; *Forbes v. Espy*, 21 Oh. St. 474, 483 (semble); *Hunter v. Blodget*, 2 Yeates, 480.

²⁰ It may aid comparison to print the corresponding sections of the two acts together. English Bills of Exchange Act, Section 7, par. 3: "When the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer."

The Negotiable Instruments Law, Section 9, par. 3: "The instrument is payable to bearer when it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable."

run the gauntlet of nearly fifty legislatures, had attempted anything so inexpedient as the overthrow of such a well established and universally accepted rule.²¹

The second criticism of Sub-section 9, par. 3, is that such an instrument is, under the act, payable to bearer *without being indorsed*, and that this, also, ignores the tenor of the instrument. "Nor is there any judicial precedent or mercantile custom," says Professor Ames, "in support of the notion that a bill payable to a fictitious payee, but not indorsed in the name of such payee, is payable to bearer. In all the reported cases, instruments payable to a fictitious payee have been indorsed in the name of such payee before negotiation." That is substantially true.²² If such an instrument requires no indorsement, a departure has been made from what has been supposed to be the law—and Professor Ames and Judge Brewster agree that the new act dispenses with the necessity of an indorsement. Indeed, any other reading of it seems impossible, though whether an indorsement is necessary under the English act has never been decided, and seems fairly open.²³

²¹ The rule was originally based on the doctrine of estoppel. Prior to the English act (1882) a recovery was never allowed except against a defendant who became a party to the bill knowing that the payee was fictitious. See *Minet v. Gibson*, 1 H. Bl. 569, and Review of Cases by Bowen, L. J., pp. 257-260 in *Vagliano Bros. v. Bank of Eng.*, L. R. 23, Q. B. D., 243 (1889). The English act, however, rendered the defendant's knowledge immaterial, providing merely that a bill may be treated as payable to bearer when the payee is fictitious. The American act does not go so far, however, for it contains the proviso "and such fact was known to the person making it so payable." But if the maker or drawer knows the fact, then the bill is for all purposes payable to bearer, and thus a drawee, who accepted in ignorance of the fact, would be liable.

²² In New York, however, it has been held for many years that a bill or note payable to the order of a fictitious payee is payable to bearer without being indorsed by the maker or payee. *Plets v. Johnson*, 3 Hill, 112; *Central Bank of Brooklyn v. Lang*, 1 Bosworth, 203; *Irving, N. B. v. Alley*, 79 N. Y. 536.

²³ It might be argued that the words "may be treated as payable to bearer" used in the English act mean that the bill may be so treated only when regular in all other respects, *i. e.*, among other things, when properly indorsed. Judge Chalmers, the draughtsman of the English act, says of this sub-section: "When a bill is payable to the order of

Judge Brewster defends the change. He says: "Surely it is more logical to hold that a note which purports to be payable to a person when there is no such person, and the maker knows it, must have been intended to be payable to bearer, than to hold that somebody must assume the name of such fictitious person and make a false indorsement in order to give title to the note." There is much common sense in that. But the trouble is that title to a note payable to order is derived through the indorsement on the back of it. What "must have been intended" by a maker who names a fictitious payee it is extremely hard to say. Moreover, both commercial practice and legal theory tend more and more to disregard everything except that which actually appears on the instrument. When A. makes his note payable to "John White or order" all our notions about negotiable paper require that John White be written on the back of this note, even though no such person as John White exists. It seems necessary for form's sake. To dispense with the necessity for it gives a decided jolt to our ideas. Aside from this, however, it is difficult to see how any harm can result from the change. In the first place (and though this does not touch the theory of the criticism, it does touch its practical worth) notes payable to fictitious payees and unindorsed, will be about as plentiful as counterfeit dollars labelled "counterfeit." Either the maker or the person to whom he delivers the instrument will indorse it in the name of the fictitious payee.

a fictitious person, it is obvious that a genuine indorsement can never be obtained, and in accordance with the language of the old cases and text books, the act puts it on the footing of a bill payable to bearer. But inasmuch as a bill payable to one person but in the hands of another is patently irregular, it is clear that the bill should be indorsed, and perhaps a *bona fide* holder would be justified in indorsing it in the payee's name. It might have been better if the act had provided that a bill payable to the order of a fictitious person might be treated as payable to the order of anyone who should indorse it, or, in other words, as indorsable by the bearer." Chalmers' Bills of Exchange, 5th Edition, page 22. From this, it would appear that the failure of the English act to require an indorsement was a mere oversight—though the use of the words "may be treated" furnishes a method of correcting the omission. Judge Brewster's readiness to defend the change in the American act seems to indicate that the change was intentional. Except for this, one would suppose that it had been an oversight.

Why? Because otherwise no one would discount it. It would be patently irregular on its face. An indorsement is necessary to give such a note *any commercial value*. Professor Ames supposes one case which, in his opinion, works an injustice on the maker. He says, "By the combined effect of this section and section 16²⁴ if a note payable to a fictitious payee were stolen from the maker and indorsed by the thief in the name of the payee, the maker would be liable upon the note to any holder in due course. For, the note being already payable to bearer, the forged indorsement in the payee's name would be of no legal significance. Such a result would be a cruel injustice to the maker."

Clearly the maker would be liable in such a case, but is this a "cruel injustice?" If the note were stolen when made expressly payable to bearer or when made payable to a fictitious payee, and then indorsed, there would be no injustice in holding the maker. How much more sympathy is he entitled to when (though not indorsing the note) he deliberately chooses to name a payee, well knowing that there is no such person in existence. If it is merely a question of the actual justice meted out, it takes a nice distinction and a very tender heart to produce much sympathy for the maker in the case supposed. Both parties are innocent of fraud, but it is the maker's conduct that made the fraud possible and he should bear the loss. Even in the rare case where no indorsement whatever appears on the back of the note, no actual injustice is done in holding the maker liable. The real worth of the criticism lies in its technical point, namely, that this sub-section permits the transfer, without indorsement, of an instrument which, for all that appears on the face of it, requires an indorsement to make a valid transfer.

It remains to notice one or two other points before passing this sub-section.

In his first paper, Judge Brewster seemed to suggest that notes payable to the order of unincorporated associations or to the estates of deceased persons are payable to bearer

²⁴ Section 16 provides, *inter alia*, "Where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him, so as to make them liable to him, is conclusively presumed."

by force of Section 9, par. 3. Professor Ames performs a real service in disposing of such a notion in vigorous fashion, though the discussion on this point was evidently due to a misunderstanding, as in his second paper, Judge Brewster disclaims holding any such view as that attributed to him. The point, however, is worthy of notice, since both Mr. Crawford and Mr. Selover, in their published Annotations of the act, seem to have gone astray on this point and to seriously regard notes payable to the estate of a deceased person as payable to bearer.²⁵ Such an interpretation is opposed alike to reason and authority, and should it prevail, much harm might result. Moreover, such was not the law prior to the act, and there is absolutely nothing in this subsection which either suggests or warrants such a change.

The meaning of the words "fictitious or non-existing person," used in the corresponding section of the English act, came before the House of Lords in the case of *Vagliano Bros. v. The Bank of England*.²⁶ The plaintiffs in that case were in the habit of accepting bills drawn on them by "V" (their foreign correspondent) in favor of Petridi & Co., a foreign firm.

²⁵ "Thus a note made payable to the order of the estate of a deceased person is a promissory note with a fictitious payee, and where it has been negotiated by the maker, is deemed, as against him, to be a note payable to bearer. *Lewisohn v. Kemp*, 87 Hun. 257." Crawford's Neg. Inst. Law, p. 18.

"When the name of the payee does not purport to be the name of any person, as in the case of instruments payable to an estate . . . the paper is payable to bearer. *Scott v. Parker*, 5 N. Y. Supp. 753; *Lewisohn v. Kemp*, 33 N. Y. Supp. 826." Selover's Neg. Inst. Law, p. 73.

True, there is a dictum to this effect in *Lewisohn v. Kemp*, but, as Professor Ames justly says: "It is a perversion of language to call the payee in such a note a fictitious or non-existing person. In *Shaw v. Smith*, 150 Mass. 166, and *Peltier v. Habillon*, 45 Mich. 384, such a note was properly interpreted as a note payable 'to the legal representatives of A.' As to bills payable to an unincorporated company, Judge Chalmers says: 'The signature of a fictitious person must be distinguished from the signature of a real person using a fictitious name—for instance, John Smith may trade as 'The Birmingham Hardware Company' and sign accordingly. *Schultz v. Astley* (1836), 2 Bing. N. C. 544.'" Chalmers' Bills of Exchange, 5th Edition, p. 23.

²⁶ L. R. 23 Q. B. D. 243 (1889) and L. R. 16 Appeal Cases 107 (1891).

One Glyka, the plaintiffs' clerk, fraudulently drew a bill in V.'s name on the plaintiffs, payable to Petridi & Company. After the plaintiffs had accepted it, Glyka forged Petridi & Company's name and had the bill cashed by the Bank of England. Of course, Glyka never intended that the bill should be delivered to Petridi & Company or that they should receive any money on it, the whole transaction being a fraud on his part. The question came up whether this was a bill payable to bearer within this sub-section of the English act. The House of Lords, reversing the lower court, held that Petridi & Company was a fictitious person within the act and that the bill was therefore payable to bearer, but the opinions delivered in both courts disclose a wide difference of opinion as to the true meaning of the words "fictitious or non-existing person."²⁷ The possi-

²⁷ The majority in the Lower Court, speaking through Bowen, L. J., held that Petridi & Company were not fictitious payees, inasmuch as they were not known to be such by the party sought to be charged, *i. e.*, the acceptor. "By the words 'The bill may be treated as payable to bearer' must surely be understood 'treated as against those who are to be made liable for the bill.' The word 'fictitious' must in each case be interpreted with due regard to the person against whom the bill is sought to be enforced. . . . If the obligations of the acceptor are in question, and the acceptor is the person against whom the bill is to be so treated, 'fictitious' must mean fictitious as regards the acceptor and to his knowledge." Such an interpretation could scarcely be made under our act, which, instead of saying, "may be treated as payable to bearer" says, "is payable to bearer" and clearly points out the only person whose knowledge is material, *i. e.*, the person making it so payable.

Lord Bramwell, in a trenchant dissent in the House of Lords, held that Petridi & Company was not a "fictitious or non-existing person" within the meaning of the act, since it was a real, existing firm, "as identifiable as N. W. Rothschild & Company—Glyn, Mills, Currie & Company—as the Bank of England itself." On the other hand, Esher, M. R. (dissenting in the Lower Court), thought that "fictitious" must embrace an existing person for "If 'fictitious' in this sub-section does not apply to the name of an existing person, who is not really intended to be the payee, I can see no distinction between 'fictitious' and 'non-existing' in the sub-section." Lord Bramwell characterized this argument as "very feeble. . . . A prudent draughtsman does not accurately examine whether a word will be superfluous. He makes sure by using it."

Judge Chalmers says that the words "or non-existing" seem superfluous and that they probably were intended to cover the case of *Ashpitel v. Bryan* (1863), 32 L. J. Q. B. 91, in which, by arrangement

bility of litigation of the same sort under our act might have been avoided by substituting "when the drawer or maker knowingly makes the instrument payable to the order of a *fictitious or non-existing payee, or a living person not intended to have any interest in it*,"²⁸ though probably the words of the act will prove to be sufficiently precise.

Finally, it may be noted that the words used in the English act "*may be treated as payable to bearer*" are less

between the indorsee and acceptor, a bill was drawn and indorsed in the name of a deceased person. Chalmers' Bills of Exchange, 5th Edition, pp. 21 and 22.

Halsbury, L. C., held that if the person named in the bill is not the real *payee*, then, although a real *person*, he is "fictitious" within the statute. But Lord Selbourne thought the statute did not extend to the case of a real person falsely represented as payee because "the Legislature has here described 'a *person*' as 'fictitious or non-existing' instead of saying 'when the *payee* is fictitious or non-existing.'"

The majority of the House of Lords held (though for very different reasons) that Petridi & Company were fictitious payees within the meaning of this sub-section and that, therefore, the bill was payable to bearer.

See also *Clutton & Co. v. Attenborough*, L. R. 2 Q. B., pp. 306 and 707. The plaintiffs' clerk, by fraudulently representing that work had been done for them by one George Brett, induced them to draw checks payable to the order of George Brett in payment of the pretended work. In point of fact, no such person as George Brett existed. The clerk then forged Brett's indorsement and cashed the checks. Held that Brett was none the less a fictitious or non-existing person within the act because at the time of drawing the checks the plaintiffs supposed him to be a real person. Therefore, these checks were to be treated as payable to bearer. The decision in this case would be different under the American act, which insists that the fictitious character of the payee must be known to the person making the instrument so payable.

²⁸ The words in italics are practically Professor Ames' suggestion, except that he uses "person" instead of "payee." It is submitted that the latter word would be better. "In truth, if strictly construed, the words 'fictitious person' are a contradiction. One may pretend there is a person when there is not. One may assume a character which does not belong to one. But to satisfy the word 'fictitious,' as applicable to a person, is assuming in one part of the proposition what is denied in the other." Per Halsbury, L. C., in *Vagliano Bros. v. The Bank of England*. In addition to this rather fine spun reason, the use of the words "fictitious *person*" presented a real difficulty to Lord Selbourne. See extract from his opinion, cited in the preceding note on *Vagliano Bros. v. Bank of England*.

fortunate than the wording of our act, which says, "is payable to bearer when," etc. Under our act, it is payable to bearer for all purposes just as completely as if it had indeed been expressly so drawn. In England, however, the question may arise, "Who may so treat it?" In *Vagliano Bros. v. The Bank of England*, Lord Bramwell insisted that this sub-section was inserted solely for the benefit of the holder, but the majority thought that the bill might be treated as payable to bearer by any person whose rights or liabilities depended upon whether it was a bill payable to order or to bearer.

Section 9, par. 1-5 :

"The instrument is payable to bearer (1) when it is expressed to be so payable; or (5) when the only or last indorsement is an indorsement in blank."

Section 40, which is involved in the discussion of Section 9, par. 1-5, reads :

"When an instrument, payable to bearer, is indorsed specially, it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement."

One or two preliminary observations may aid to a proper understanding of the criticisms made of these sections.

Blank indorsements were unknown to the early law of Bills and Notes, which required that the name of the indorsee should be contained in the indorsement. A practice later arose by which the payee often wrote only his own name on the back of a bill, leaving a blank above his signature for the name of the indorsee. Hence the term "blank indorsement." The bill being transferred in this condition, the transferee or any subsequent holder has an implied authority "to write above the signature an order of payment to himself, or to bearer, or to anyone to whom he may wish in turn to transfer the bill; and the blank indorsement, when so filled up, takes effect by relation from the time of the original delivery by the indorser."²⁹ The transferee or any subsequent holder is the indorser's agent for this pur-

²⁹ Ames' Cases on "Bills and Notes," Vol. 2, p. 837.

pose. For a long time it was necessary to exercise this authority and fill out all the blank indorsements on a bill at or before trial. Gradually this last requirement was dispensed with, and thus a bill payable to the order of A.—with A.'s name written on the back (no indorsee being named) could be recovered on by the holder.³⁰ Such instruments are said to be payable to bearer, and indeed they are so while the indorsement remains blank, but although the *necessity* of filling up a blank indorsement has been dispensed with, the *right* to do so has never been abridged, and the holder of a bill or note has to-day, as he always had, the right to fill up any or all blank indorsements on the instrument and thus make it payable only to order.

It is to be observed—and this is important—that these rules in no way violate the original tenor of the instrument. The maker has promised to pay “A. or order” and A., by signing his name with a blank above it and handing it to B., authorizes B. or any subsequent holder to designate the person entitled to receive payment. Until they do so designate him, the holder is the man entitled. Now, suppose B. indorses specially to C. or order, and then C. transfers the paper to D. by mere delivery. Should D. be allowed to sue the maker as on a note payable to bearer? No, for since the maker has promised only to pay to A.'s order—and since A. has given B. or any holder authority to designate the one to whom the sum shall be paid—and since B. has designated that it shall be paid “to C. or order”—plainly no one who cannot trace title through C. comes within the terms of the maker's promise. That is the logical view, and it is the view that the merchants and bankers adopted, *i. e.*, a blank indorsement of a note payable to order is controlled by the subsequent special indorsement.

But the courts held otherwise. In the case of *Smith v. Clarke*,³¹ decided in 1794, a bill originally payable to order,

³⁰ This added a new term to the indorser's order, *i. e.*, that until the blank was filled up the instrument should be payable to bearer.

³¹ Peake, 225. Although in a case which arose some years earlier, *Ancher v. Bank of England*, 2 Douglas, p. 637 (1781), Lord Mansfield evidently agreed with the understanding of merchants that a blank indorsement was controlled by a subsequent special indorsement. However, the exact point decided in *Smith v. Clarke* was not involved in that case.

was indorsed in blank by the payee and was subsequently indorsed specially. Lord Kenyon held that the bill was payable to bearer as long as the first indorsement remained blank, and that the holder might therefore strike out the special indorsement and recover as on a bill payable to bearer. *Smith v. Clarke* has been generally followed both in England and America.³² This decision was opposed to the view held by the business community, and so, in 1882, the framers of the English act, in order "to bring the law into accordance with the mercantile understanding, by making a special indorsement control a previous indorsement in blank,"³³ provided in Section 8, par. 3:

"A bill is payable to bearer which is expressed to be so payable, or on which the only or last indorsement is an indorsement in blank."

The provisions of Section 9, par. 1-5 of the American act are the same as those of the English act and were inserted for the same reason.

It is further to be observed that *Smith v. Clarke* and all of the cases which follow it are cases of instruments *originally payable to order*. None of these cases contains a syllable about instruments originally made payable to *bearer*. There is an important distinction between the two kinds of instruments. For reasons which I have referred to above, the custom of merchants, which has now been adopted by both the English and American acts, says that in the case of an instrument originally payable to order, a blank indorsement is controlled by a subsequent special indorsement, because in such a case the maker's promise embraces only those who make title through the special indorsement. But a note *originally payable to bearer* is another matter. It is a violation of the plain tenor of such a note to treat it as other than payable to bearer. That is the maker's absolute

³² *Walker v. MacDonald*, 2 Wels Hurl & Gordon, 526 (1848); *Howie v. Bailey*, 16 La. 213 (1840); *National Bank v. Haskins*, 101 Mass. 370 (1869); *Houry v. Eppinger*, 34 Mich. 31 (1876); *Wateruliet Bank v. White*, 1 Denio 608 (1845); *Pentz v. Winterbottom*, 5 Denio 51 (1847); *French v. Barney*, 1 Iredell 219 (1840); *Mitchell v. Fuller*, 15 Pa. 268 (1850); *Rand v. Dovey*, 83 Pa. 280 (1877). Contra: *Myers v. Friend*, 1 Randolph 12 (1821).

³³ Chalmers' Bills of Exchange, 5th Edition, p. 24.

promise—to pay the bearer. His promise cannot be qualified or changed in any way by a subsequent holder. The only effect of a special indorsement on such a note is that the *indorser* can be held only by those who make title through his indorsement.³⁴

This distinction between instruments originally payable to bearer and instruments originally payable to order and then indorsed in blank is preserved both in the English and American acts. Under both acts, a note originally payable to bearer and specially indorsed continues payable to bearer, while an instrument originally payable to order is payable to bearer only when the last indorsement is in blank. Professor Ames says that this distinction is “illogical and undesirable” though he gives us no reasons. Judge Brewster’s reply is equally brief: “The reason why such a rule is ‘illogical and undesirable’ is not clear.” It is submitted that for the reasons noted above, this distinction is decidedly “logical,” and inasmuch as it appears to obtain generally throughout the business community, its continued observance by the Code would seem to be “desirable.”

Professor Ames further criticises this sub-section, as follows:

“If an instrument indorsed in blank and subsequently indorsed specially, so that it is no longer payable to bearer, is transferred by the special indorsee by delivery merely, the transferee cannot sue parties prior to the special indorser in his own name, but only in the name of his assignor. This puts the assignee to unnecessary inconvenience. As owner of the instrument, although not, according to this sub-section, holder, he ought to have the right to strike out the special indorsement, thus making the instrument once more payable to bearer, and as bearer to sue upon it in his own name.” *I. e.*, A. makes a note to B. or order. B. indorses in blank. C. indorses it “to D. or order” and D. delivers it (without indorsement) to E. Professor Ames thinks that E. should have the right to strike out C.’s indorsement and sue A. or B. as on a note payable to bearer.

³⁴ Story, Bills of Exchange, Section 207; Wood’s Byles on Bills and Notes, 151.

Why should he have this right? It has long been the law (and still is under Section 48)³⁵ that the holder may strike out any indorsements which are not necessary to his title. The law has never permitted him to strike out indorsements which are necessary to his title.³⁶ Now, so long as Lord Kenyon's doctrine³⁷ prevailed, the holder had the right to strike out all indorsements subsequent to the first blank indorsement because the instrument was by that first blank indorsement payable to bearer and a subsequent special indorsement did not change its tenor and was therefore not necessary to his title. But this sub-section was inserted for the express purpose of doing away with Lord Kenyon's doctrine. Everybody agrees that a blank indorsement of an instrument originally payable to order ought to be affected by a subsequent special indorsement. What does this change mean, then? Why it means (taking the case Professor Ames supposes for us) that by virtue of the special indorsement by C. the note has again become payable *only to order*, and therefore C.'s indorsement cannot be stricken out by a subsequent holder *because it is necessary to his title*. Suppose D. had in his turn indorsed specially to E. The latter (though now a *holder* within the meaning of the act) could not strike out the indorsements of C. and D. Why? Because the instrument being now again payable to order only, the indorsements of C. and D. are necessary to his title, and so Section 48 gives him no right to strike them out. Professor Ames says, "As owner of the instrument, he ought to have the right." But ownership of a bill or note gives the holder no right to alter it—to change the tenor of any of the promises which it evidences.

Judge Brewster answers this criticism, however, in another way. He first agrees with Professor Ames that E. (in the case supposed) ought to be allowed to strike out C.'s special indorsement, and then he tries to give him this

³⁵ Sec. 48: "The holder may at any time strike out any indorsement which is not necessary to his title. The indorsee whose indorsement is struck out, and all indorsees, subsequent to him are thereby relieved from liability on the instrument."

³⁶ Story, Promissory Notes, Section 208.

³⁷ *Smith v. Clarke*, *supra*.

right.³⁸ He first points to Section 48, which gives the right to strike out indorsements not necessary to title. But Professor Ames reminds him that Section 48 confers this right only on *holders* and that E. is not a holder, for "holder" is defined in Section 191 to mean "The payee or indorsee of a bill or note who is in possession of it, or the bearer thereof," and "bearer" is defined by the same section to mean "The person in possession of a bill or note which is payable to bearer." Both ignore the fact that in the case supposed C.'s indorsement is necessary to E.'s title.

In order to give E. the right to sue the maker, Judge Brewster next refers to Section 40, which provides *inter alia* that "When an instrument payable to bearer is indorsed specially, it may nevertheless be further negotiated by delivery."

"This section," says Judge Brewster, "which authorizes a transfer by delivery seems to give the transferee the right to sue in his own name, otherwise the note would not be negotiated within the meaning of the act." But if Section 40 applies to a note originally payable to order—then indorsed in blank and made payable to bearer—and then indorsed specially—if such an instrument may still be negotiated by delivery, then the rule of *Smith v. Clarke* is still in full force, and Section 9, par. 5, which was inserted to overthrow *Smith v. Clarke* is a nullity. That carries us to the next criticism.

Professor Ames insists that Section 40 completely nullifies Section 9, par. 5, and that for this reason only may E. sue the maker in the case supposed. His position is that Section 9, par. 5, was inserted to change the old rule that

³⁸ Mr. Farrell answers Professor Ames as follows: "In answer to this, it is necessary only to say that in most jurisdictions he may bring suit in his own name, being the real party in interest." (The Negotiable Instruments Law, by Jno. Lawrence Farrell. Brief of Phi Delta Phi, Vol. III, No. 2, First Quarter, 1901.) But the statutes which permit an assignee to sue in his own name have effected merely a procedural change. He is still an assignee merely and can be met by any defence arising out of the instrument which could be pleaded against the assignor. The question is not, in whose name shall E. bring suit (a minor point), but it is, what right can E. assert.

an instrument "payable to bearer (or indorsed in blank)"³⁹ although afterwards specially indorsed, was still negotiable by delivery—that "then, in apparent forgetfulness of the effect of Section 9, par. 5," Section 40 was inserted providing that an instrument payable to bearer and indorsed specially is still negotiable by delivery, the special indorsee being liable only to such as make title through his indorsement, and that this section (40) thus changes the law back to its former state.

Judge Brewster's answer is:

"Section 40 is claimed to be repugnant to Section 9, par. 5, but this is not so. Section 9, par. 5, declares a note to be payable to bearer when its last indorsement is in blank; *40 relates to a note when the last indorsement is special, and provides that it may then be transferred by delivery,*⁴⁰ in order to cover cases of good faith where title is frequently passed in that way, by persons ignorant of mercantile usage."

It is submitted that that is no answer, and for this reason. If a bill *may be transferred by delivery*, it is payable to bearer. Section 40, on Judge Brewster's reading, permits a bill whose last indorsement is special to be payable to bearer, yet Section 9, par. 1-5 was inserted to permit only bills originally payable to bearer or whose last indorsement is in blank to be payable to bearer.⁴¹

³⁹ These are Professor Ames' words; but if by "Payable to bearer" he means *originally* payable to bearer, it is submitted that neither *Smith v. Clarke* nor any of the cases which follow it say any thing about such instruments. They are all cases of instruments originally payable to order.

⁴⁰ The italics are the reviewer's.

⁴¹ Judge Brewster cites the following passage from the new Norton Horn Book by Mr. Tiffany, p. 116 to prove that Section 40 and Section 9, par. 5 are in harmony: "An instrument which is originally payable to bearer, or which has been indorsed in blank, though afterwards specially indorsed, is still payable to bearer; except as to the special indorser, who, on such an indorsement, after such an indorsement, is only liable on his indorsement to such parties as make title through it."

It is submitted that the above tends to prove just the reverse, because if by Section 40 an instrument originally payable to order, then indorsed in blank, and then specially indorsed, is still payable to bearer, Section 9, par. 5 (which intended to make only instruments whose last indorsement is in blank payable to bearer) is nullified.

I submit that in one way and one way only can these two sections be harmonized. If Section 40 be interpreted as applying only to instruments originally payable to bearer, there can be no difficulty as to either section. True, it reads merely "When an instrument payable to bearer is indorsed specially," etc., and there is no denying that if it meant only an instrument originally payable to bearer it should have said so. At the same time, the words used are commonly understood to describe an instrument originally payable to bearer, and there is the additional reason that unless these words are so interpreted here, the section is diametrically opposed to Section 9, par. 5, a conclusion plainly to be avoided if possible. Again, Section 9, par. 5, can be construed in only one way, while Section 40 may be construed either as being opposed to or as being in harmony with it. Moreover, such an interpretation would be good law. At the opening of the discussion of these sections, some reasons were submitted why the distinction between instruments originally payable to bearer and those originally payable to order and indorsed in blank, was both logical and desirable. However this may be, such a distinction is certainly made in Section 9, par. 5, and it has been made without complaint for twenty years in the English act. The suggested interpretation of Section 40 preserves this and the two sections would be harmonious. By Section 9, par. 1, an instrument originally payable to bearer continues to be payable to bearer even though specially indorsed. But if it is specially indorsed, then by Section 40 "the person indorsing specially is liable as indorser only to such holders as make title through his indorsement," and this has always been the law.⁴² By Section 9, par. 5, on the other hand, a bill originally payable to order is payable to bearer only when the only or last indorsement is in blank. Every one of these propositions is good law and accords with the understanding of merchants.

Mr. Crawford, the draughtsman of the act, actually regards Section 40 as embodying the decision of *Smith v. Clarke* (Crawford's Annotated Negotiable Instruments Law, p. 41). Yet admittedly Section 9, par. 5 was intended to overthrow that decision.

⁴² Story, Bills of Exchange, Section 207; Wood's Byles on Bills and Notes, p. 151.

The remaining criticism of this sub-section is unimportant. "If it is to be taken as it stands," says Professor Ames, "a note payable by A. to the order of B., and bearing the anomalous blank indorsement of C., would be payable to bearer. This, of course, would be an absurdity, but it is certainly true that the only indorsement is an indorsement in blank."

Professor Ames does not suggest that any merchant, any lawyer, any court would ever give the section such a construction. Nor does it require any stretch of the English language to arrive at its proper meaning. An anomalous indorser is not strictly an indorser at all. He is called one for convenience sake and a liability closely resembling that of an indorser is fastened upon him. But a section which uses the word "indorsement" with reference to the transfer of an instrument, could scarcely be regarded as having any reference whatever to an anomalous indorser. The words used in Section 9, par. 5, of the American act have been found entirely satisfactory in the English act throughout twenty years' experience, and there can be no reasonable doubt as to their meaning with reference to an anomalous blank indorsement.

Section 20:

"Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing the principal, does not exempt him from personal liability."

Professor Ames criticises this section as follows:

"Section 20 provides that a person who purports to sign an instrument in behalf of a named principal is not liable on the instrument, if he was duly authorized by the principal. By necessary implication he is liable on the instrument if not duly authorized.⁴³ This is a departure from the English act and from the almost uniform current of judicial deci-

⁴³ "Mr. Crawford so interprets the section. Crawford's An. N. I. L. 26."

sions. This new rule involves a flat contradiction of the instrument, and the fiction works not justice, but injustice."

The section is copied from Article 95 of the German Exchange Law, and undoubtedly is a departure from the English act, under which the pretended agent is liable, not on the instrument, but for the damage resulting from the breach of his implied warranty of authority to sign for the principal. Mr. Crawford's original draft embodied the English rule,⁴⁴ but the Commissioners changed it and adopted the German rule deliberately and after mature consideration. It is scarcely true that in doing so they departed from "the almost uniform current of judicial decisions." There is a strong conflict of authority on the point, some states holding the pretended agent liable on the instrument itself, while a somewhat larger number hold him liable only for the damage resulting from the breach of his implied warranty of authority.⁴⁵ The latter decisions seem correct on theory. As was said in *Hall v. Crandall*, if the instrument contains language which does not in legal effect charge the pretended agent, "or, in other words, contains language which, in legal effect, binds the principal only, the agent cannot be sued on the instrument itself, for the obvious reason that the contract is not his." He has falsely represented that he had authority to bind another, but he has not intended or attempted to bind himself, and courts which hold him liable on the contract itself "treat all matter which the contract contains in relation to the principal as surplus-

⁴⁴ Crawford, An. N. I. L. 26.

⁴⁵ In the following states the pretended agent appears to be held liable on the contract itself: *Ormsby v. Kendall*, 2 Ark. 338 (but see *Dale v. Donaldson*, 48 Ark. 190); *Richie v. Bass*, 15 La. Ann. 668; *Terwilliger v. Murphy*, 104 Ind. 32; *Keener v. Harrod*, 2 Md. 63; *Byas v. Doores*, 20 Mo. 284; *Weare v. Gove*, 44 N. H. 196; *Clarke v. Foster*, 8 Vt. 98.

In the following states, the pretended agent is held liable not on the contract itself, but for the damage resulting from the breach of his implied warranty of authority: *Hall v. Crandall*, 29 Cal. 567; *Johnson v. Smith*, 21 Conn. 627; *Duncan v. Niles*, 32 Ill. 532 (but see *Frankland v. Johnson*, 147 Ill. 520); *Bartlett v. Tucker*, 104 Mass. 336; *Noyes v. Loring*, 55 Me. 408; *Sheffield v. Ladue*, 16 Minn. 388; *White v. Madison*, 26 N. Y. 117; *Bryson v. Lucas*, 84 N. C. 680; *Hopkins v. Mehaffy*, 11 S. & R. (Pa.) 126.

age, which is, in effect, to make a new contract for the parties concerned instead of construing the one which they made for themselves."⁴⁶

Judge Brewster's answer is: "One signing a note as agent for another should know and be able to show his authority. If he signs without authority, he alone in fact, and so in law, is the maker of the note, and he should be held liable accordingly." This view, though perhaps difficult to justify on the principles of contract, is supported by weighty authority,⁴⁷ and important practical advantages. The rule will tend to increase negotiability, by assuring the holder that if the pretended principal cannot be reached because of a lack of authority in the agent, a recovery may be had on the instrument itself against the agent. Then there is the additional advantage—which on reflection will appear to be of great importance—that the liability of the agent can be easily proved and the amount to be recovered ascertained by a mere inspection of the instrument, whereas if the only recovery were for damages resulting from a breach of warranty, a complicated set of disputed facts would often go to

⁴⁶ *Hall v. Crandall*, *supra*. Referring to the cases which hold the pretended agent liable on the instrument, Walton, J., said in *Noyes v. Loring*, 55 Me. 408: "The inconsistency of such a doctrine, to use no stronger term, will be apparent by supposing that instead of a promise to pay money the pretended agent had signed a promise that his principal should marry the plaintiff within a given time, or do some other act which it was perfectly competent for the principal to perform, but which the agent could not. What would be thought of a declaration charging the pretended agent as a principal in such a case?"

⁴⁷ To the decisions referred to above, and the very high authority of the German Code, there may be added the opinion of Mr. Arthur Cohen, Q. C. (one of the framers of the English act, and admittedly one of the leading experts in England on this subject), who regards Section 20 as an improvement on the English act. He says: "This section certainly alters the law as it exists in England, but I think it very likely that the alteration is an improvement. The wisdom of the rule laid down in *Cohen v. Wright* has often been doubted. . . . I think the 20th Section should be retained, and may be considered as a practical improvement of the law, unless there be reason to suppose that merchants and bankers think it unjust. I agree with Mr. Brewster that much indulgence should not be shown in business to a person who professes to have authority when he is really acting without authority." Letter from Mr. Cohen to Judge Brewster, written March 31, 1901.

the jury, from which it would be difficult even to approximate the damage. The case which Professor Ames supposes, as proving the injustice of Section 20 may serve as an illustration of this. He says, "For example, A., mistakenly believing that he is duly authorized, signs a note, 'A., agent for B.,' and delivers it to C., the payee. At maturity B. repudiates the note. He is, however, at that time a bankrupt. A. is rightfully chargeable to C. on his implied warranty of authority, but only to the amount that C. might have recovered from B., if he had authorized the note. But under Section 20 A. is liable to C. for the face of the note." But, as Mr. Cohen points out, "It would be doubtful what could be recovered until the dividend was declared and the bankruptcy concluded; and in the case of the principal not being bankrupt, but being a man in bad credit, the question would have to be left to a jury what amount could probably be recovered from the principal. It may well be held that in actions on negotiable instruments against a person who professedly acts on behalf of another person, A., it would be inconvenient to allow the former to attempt to prove that probably the whole amount could not be recovered from A."

So the case stands about as follows: The rule discarded by the Commissioners works out the rights of the parties strictly on the rules of contract, and the balance of authority is in its favor. Under it, however, a plaintiff may encounter considerable difficulty and uncertainty in proving his case. The rule they have embodied in the act—while perhaps less clear on theory—is supported by the authority of several states, by the German Code, by some of the best expert opinion of England, and (besides tending to increase negotiability) enables a plaintiff to know and prove, with ease and certainty, the amount to be recovered. Of course, under such circumstances, individual opinion will differ somewhat as to which rule should have been chosen.

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(To be continued in the September number.)